Filed 8/17/10 P. v. Hernandez CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HERNANDEZ, JR., Defendant and Appellant.	B212451 (Los Angeles County Super. Ct. No. VA 083422)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey L. Falcone, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Robert Hernandez, Jr., was convicted by a jury of first degree murder, two counts of attempted premeditated murder and of possessing a firearm as a convicted felon; the jury also found true multiple enhancements, among which was that the crimes were committed for the benefit of a street gang. Appellant pleaded guilty to selling and possessing methamphetamine while armed with a firearm and to another count of being a felon in possession of a firearm. He admitted having served two prior prison terms and having suffered one prior felony-strike conviction. He was sentenced to a term of 130 years to life. We affirm the conviction.

FACTS

The confrontation that ended in a fusillade of gunshots and murder began around 3:40 p.m. on February 10, 2004, when one of the victims, Christopher Deckard, was walking on a street in East Lakewood, in the territory of the Artesia street gang. Appellant, described as a hardcore member of this as well as other gangs, challenged Deckard to state where he was from, which is taken as a challenge to fight. After Deckard replied that he used to be, but was now no longer, a member of the Paramount gang, appellant displayed a chrome handgun tucked into his waistband and struck Deckard's jaw with his fist. Manuel Camarena, one of appellant's companions, prevailed on appellant to desist with the argument that Deckard was not an enemy. Appellant told Deckard to leave.

Deckard continued to walk toward a friend's house when victims Justin Stevens and Richard Perez drove up, stopped and said hello to Deckard, whom they knew; Stevens and Perez remained in the car. (Appellant was convicted of the murder of Perez and the attempted murders of Deckard and Stevens.) Appellant, Camarena and another companion, Henry Fernandez (all members of the Artesia gang),[1] were following Deckard on foot and came upon the stopped car. Appellant challenged Stevens who replied by saying that he was from "[n]owhere," thus hoping to decline the challenge. Appellant shouted "Artesia" and started firing from a black semi-automatic handgun.

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[1] All three were charged; appellant's trial was severed.

Stevens floored the accelerator but five shots hit the car and, as it turned out, two of them struck Stevens and Perez. Deckard, who was standing a few feet away, froze when he saw appellant point the gun at him and fire. Fortunately, appellant ran out of ammunition and Deckard was able to get away by jumping over a wall.

Stevens and Perez were able to make it in the car to a friend's house within a few minutes. Police and paramedics were able to respond very quickly. Stevens survived the shooting with a collapsed lung but Perez bled to death, having been struck in his left subclavian blood vessels.

Three expended shell casings found on the scene by the police, and the bullet taken from Perez's body, had been fired from the same nine-millimeter semi-automatic Luger.

Stevens, who was taken to a hospital, was interviewed at the scene and also in the hospital. He gave a full description of appellant, which included a tattoo on the left side of his neck. Stevens identified appellant in a photographic lineup, in an actual lineup and at trial.

Deckard was interviewed in February 2004 and on May 4, 2004, when he was in jail for methamphetamine possession. In these interviews, Deckard related the foregoing events and identified appellant as the shooter by his name, as well as his appearance, in a photo lineup. By the time of the preliminary hearing, however, Deckard had become hostile and uncooperative, stating that he was fearful of retaliation.

Appellant's defense was one of alibi per the testimony of his aunt, Norma Vasquez. The persuasiveness of this testimony is questionable since the alibi was that Vasquez saw appellant in front of her son's house in La Mirada at 2:30 p.m. The shootings, as noted, took place around 3:40 p.m. in East Lakewood.[2] That the defense

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[2] Vasquez also testified that she learned on the phone between 2:15 p.m. and 2:25 p.m. that there had been a shooting in Lakewood. According to Vasquez, this shooting was covered by television news. In light of the time of the shooting, it is questionable whether this testimony was of any help to appellant but this aspect of Vasquez's testimony became the subject of an unsuccessful request to continue the

learned of Vasquez's testimony only eight days before trial is the basis of one of the contentions on appeal.

There was extensive testimony about street gangs in general and the Artesia gang in particular, which is not necessary to detail. Nonetheless, it is of some interest that the timing of these shootings (broad daylight) and the locale (a public street) were deliberately chosen in order to intimidate the whole community.

DISCUSSION

1. It was Not Error to Instruct the Jury That Delayed Disclosure of Evidence Could Be Considered as a Sign of Consciousness of Guilt

At trial, the parties stipulated that the defense informed the prosecution about Vasquez's expected alibi testimony eight days before trial and that defense counsel did not recall learning of this testimony at any time earlier than eight days before trial.

Without objection, the trial court instructed the jury in terms of CALJIC No. 2.28, which states in substance that delayed disclosure of evidence can be considered as a sign of consciousness of guilt but, standing alone, this is not sufficient to prove guilt.

Appellant contends that this instruction should not have been given because the adverse impact of the instruction affected appellant "without proof that he participated in any manner whatsoever in the discovery violation." This argument is predicated on the aspect of CALJIC No. 2.28 that requires the jury to first find that the delayed disclosure was by the defendant personally or was authorized or done at the defendant's direction.

The timing and circumstances of the disclosure of Vasquez's testimony was handled by a stipulation read to the jury, as we have already noted. The fact that the parties proceeded by way of a stipulation is significant for two reasons.

First, at trial the defense was satisfied that the stipulation adequately covered the matter of the late discovery of Vasquez's testimony. The argument that is now propounded effectively states that the stipulation was unsatisfactory because it should

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hearing on the motion for new trial. We return to this in part 3 of the Discussion of this opinion.

also have covered appellant's lack of responsibility for the discovery violation. But, given that the defense entered into the stipulation voluntarily, appellant is now estopped from claiming that the stipulation was defective or incomplete. (See generally 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, pp. 495-497.)

Second. The time to assert that appellant was not chargeable with the delay was then, and not for the first time in this appeal. If this point had been raised, evidence would have been received on this issue; as it is, there is nothing in the record, one way or another, on whether the delay is attributable to appellant. At this point, it is only speculation whether the delay was (or was not) attributable to appellant.

Appellant points out that Penal Code section 1259 provides that an "appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." But this is not a situation where the defense simply failed to object to an instruction. In this case, the defense delivered the issue of delayed discovery to the jury by way of a stipulation. It is now too late to claim that the stipulation was inadequate; this is unfair to both the trial court and the prosecution.

Moreover, we do not think that it is likely that the jury invoked CALJIC No. 2.28. The only evidence that the jury had about the defense's role in the delay was that defense counsel himself only learned of Vasquez eight days before trial. It can hardly be supposed that appellant would have concealed an alibi witness from his own lawyer until a few days before trial. Thus, it is highly likely that the jury concluded that appellant had no responsibility for the delay. This rendered CALJIC No. 2.28 inoperative.

In light of the foregoing, we reject appellant's contention that it was error to instruct the jury in terms of CALJIC No. 2.28.

2. It Was Not Error to Resort to Deckard's Testimony Given at the Preliminary Hearing

Appellant states that the "crux of appellant's complaint herein is that the prosecution did not make a good-faith attempt to obtain Christopher Deckard's presence at trial because of its belated attempts to locate him."

We do not agree that the prosecution was not diligent in trying to secure Deckard's attendance.

The trial was first set for September 12, 2006. It was continued thereafter no less than 12 times, trial finally commencing on November 1, 2007.

Efforts to locate Deckard began in the first week of October 2007. Deckard recently having served time in prison, he had given his grandmother's house as his residence to his parole officer. A surveillance team was deployed to cover this residence. Eventually, a woman told the officers that Deckard would be back, but he never showed up.

Knowing Deckard's history, the prosecution applied for an arrest warrant in late September 2007; a bench warrant was issued on October 10, 2007.

The police now staked out the residence of Deckard's girlfriend in Whittier. This produced no results; the girlfriend's mother, who also lived there, told the police that the girl had moved out and the mother professed not to know whether her daughter was with Deckard.

The police contacted Deckard's parole officer who also knew nothing of Deckard because Deckard had abandoned his parole obligations and had disappeared. A no-bail warrant was issued and the Fugitive Task Force initiated a full search for Deckard, but these efforts were also unsuccessful. Deckard was put on a wanted list in the computer system. No trace of him was found. This was the situation when the trial commenced.

Appellant contends that the foregoing parallels the facts found in *People v. Cromer* (2001) 24 Cal.4th 889 (*Cromer*) when our Supreme Court concluded that the prosecution had not acted with due diligence in attempting to locate a witness. The contrary is true; the facts of *Cromer* differ from the facts at bar.

In *Cromer*, trial was set for January 22, 1998. On January 20, 1998, the prosecution's investigators were told that the witness lived with her mother in San Bernardino. "Despite the urgency of the situation, prosecution investigators did nothing to follow up this information until two days later, when an investigator obtained [the witness's] mother's address (apparently from Department of Motor Vehicle records) and

drove to her San Bernardino home." (*Cromer*, 24 Cal.4th at pp. 903-904.) The investigator was told that the witness's mother was out and would return the next day; the investigator left a copy of the subpoena at the residence. The investigator never returned to speak to the witness's mother and made no further efforts to contact the witness's mother. (*Id*. at p. 904.) The prosecution checked with the "computerized information systems, the county jail, and the county hospital, the prosecution made no other efforts to locate [the witness]." (*Ibid.*)

The contrast is clear. In the case at bar, two residences were kept under surveillance, the prosecution moved in a timely fashion to obtain a bench warrant and later a no-bail warrant, Deckard's parole agent was consulted, the Fugitive Task Force was activated to search for Deckard and Deckard was put on a wanted list in the computer system. Unlike *Cromer*, the search was pursued vigorously and was not abandoned, as it was in *Cromer*, after a single visit.

We must independently review the trial court's determination that the prosecution exercised due diligence in attempting to locate Deckard. (*Cromer*, *supra*, 24 Cal.4th at p. 901.) We find that the search was begun timely and that the leads were competently explored.[3] We conclude that the prosecution acted with due diligence in attempting to locate Deckard.[4]

3. The Trial Court Did Not Abuse Its Discretion in Denying a Motion to Continue the Hearing on the Motion for a New Trial

The jury returned its verdict on November 13, 2007. Sentencing was continued on January 22, 2008, when oral notice was given of a motion for new trial. The motion for

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[3] "We have said that the term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation] and whether leads were competently explored [citation]." (*Cromer*, *supra*, 24 Cal.4th at p. 904.)

[4] We grant appellant's two requests for judicial notice of materials that document the prosecution's efforts to secure Deckard's attendance at trial.

new trial was filed on April 3, 2008. Continuances were granted on April 25, June 27, August 1 and October 3, 2008. On November 21, 2008, appellant's request for a two-week continuance was denied, the motion for a new trial was denied and appellant was sentenced.

The continuance was requested in order to interview a witness who stated that he saw a helicopter over the scene of the shooting. This related to Vasquez's testimony that she saw the shooting reported on evening television news. (See fn. 2, *ante*.) Although this conflicts with testimony by the police that there was no television coverage and no helicopter over the site of the shooting, it is simply irrelevant whether the shooting was covered in the evening news or not. We agree with the trial court that this new evidence, even if it existed, could not have possibly affected the outcome of the case.

In denying the request for a continuance, the trial court noted that in a year's time following the verdict, no new evidence had come to light. The court also noted that several continuances had been granted in order to enable the defense to identify and locate witnesses who would corroborate Vasquez's testimony about news coverage of the shooting.

Appellant acknowledges that the granting or denial of a continuance is within the discretion of the trial court. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.) We see no abuse of discretion here. The motion for a new trial was pending for half a year, which was ample time to search for witnesses who would corroborate Vasquez's testimony about news reportage and who would show the police to have been wrong about this supposed "issue." Indeed, there is some question whether the hearing on the new trial motion should have been continued at all, if this was the reason for the continuance. If anything, the trial court showed a great deal of forbearance in continuing the new trial hearing four times. One would think that a fifth continuance for this reason was simply out of the question.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.